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NO. 90-1405

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF ALABAMA

PETITIONER,

V.

JOE LOUIS HARRELL

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
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ATTORNEYS FOR PETITIONER

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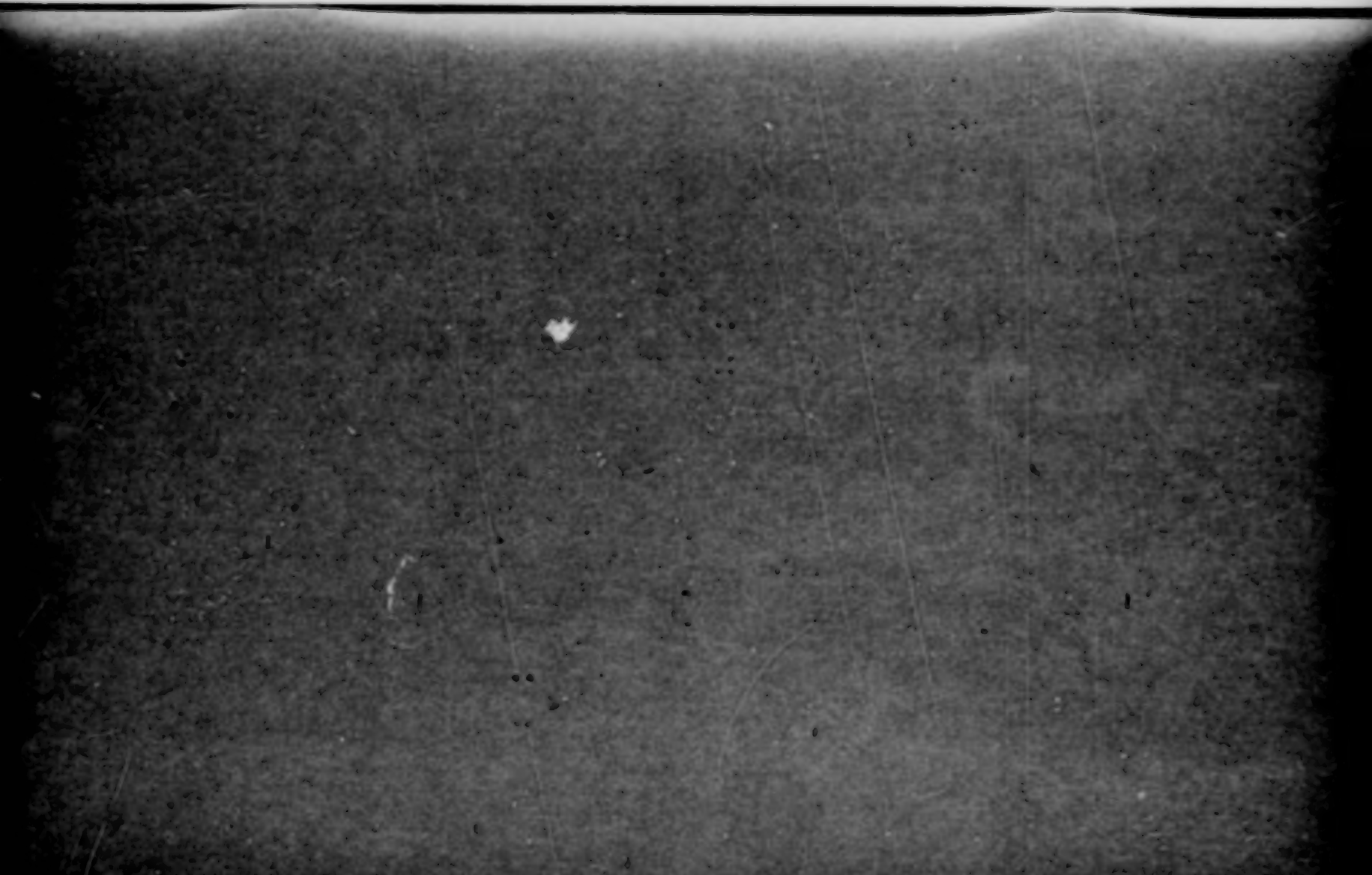

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SUPPLEMENTAL STATEMENT OF THE CASE

We submit the following for the information of this Honorable Court.

During the some three years that this case has been in litigation, the undersigned Assistant Attorney General has been in constant contact with the Mobile County District Attorney's Office concerning this case. Copies of every paper filed in the state appellate courts were provided to the District Attorney and the Assistant District Attorneys responsible for the case. Numerous telephone conversations were held with the District Attorney and his staff. Through all this, it was understood that, should the State lose in the State Courts, the substantial under-representation issue would be presented to the United States Supreme Court.

When the Alabama Supreme Court ruled against the State (see Appendix "E", to the Petition.), the State applied for a stay pending review by this Honorable Court. Copies of the State's motion were served on all opposing counsel and provided to the Trial Judge and all persons in the District Attorney's Office who were known to be involved in the case. The Alabama Supreme Court denies such motions automatically, but the undersigned sought by this means to insure that all involved parties knew of the State's intention to seek review in this Honorable Court.

When the Alabama Supreme Court denied the stay (See Appendix "F" to the Petition), the undersigned called the District Attorney's Office and obtained assurance that should the case

come up for trial, a continuance would be sought, and, if continuance were denied, the undersigned would be informed, so a stay could be obtained from a Justice of the this Court.

As late as Thursday, March 21, 1991, while discussing another matter with a ranking member of the District Attorney's staff, the undersigned was re-assured that this case was being held in abeyance in the Circuit Court.

On March 25, 1991, the undersigned received the materials filed by the Respondent in opposition to the petition and learned that the case had been dismissed in the Circuit Court on motion of an assistant district attorney. We are informed and believe that this was the result of an error, and that the case has now been restored to the docket in the Circuit Court.

SUMMARY OF THE REPLY ARGUMENT

1. Since the case has been restored to the docket in the Circuit Court, this case is not moot.

2. Termination of a criminal prosecution does not necessarily so moot a controversy as to deprive this Honorable Court of Jurisdiction.

REPLY ARGUMENT

The only point raised by the Respondent in opposition to the petition is a claim of mootness. If our information (See the last sentence of the supplemental statement of the case, above.) is correct, then the case is not moot, since it has been restored to the docket.

However, out of an abundance of caution we here address the issue of mootness.

The fact that a criminal prosecution has been terminated does not necessarily so moot the controversy as to deprive this Honorable Court of Jurisdiction. Street v. New York, note 3, 394 U.S. 576, 579, 22 L.Ed 2d 572, 578, 89 S. Ct. 1354 (1969): Ginsberg v. New York, note 2, 390 U.S. 629, 633, 20 L.Ed 2d 195, 200, 88 S. Ct. 1274 (1968): Sibron v. New York 392 U.S. 40, 50ff, 20 L.Ed 2d 917, 927 ff, 88 S. Ct. 1889 (1968).

As this Honorable Court observed in Carroll v. Commissioners of Princess Anne (393 U.S. 175, 21 L.Ed 2d 325, 89 S. Ct. 347 [1968]):

> "...We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities...In these circumstances, our jurisdiction is not at an end...."(373 U.S. 175, 178, 21 L.Ed 2d 325, 329; emphasis supplied.)

So it is here, the decision and opinion of the Alabama Supreme Court, which is now before this Court, as well as the earlier appellate opinions in this litigation (See Appendix "A", pp. 20-21 and Appendix "B"), are even now having a profound effect on how prosecutors strike juries, when defense attorneys make Batson objections and how trial judges rule on such objections.

As we point out at pages 30-38 of the petition, the mischief of the

Alabama Courts' holding in this case is not simply that it is wrong or unjust, but that it represents an application of this Court's holding in Batson v. Kentucky (476 U.S. 79, 90 L.Ed 2d 69, 106 S. Ct. 1712 [1986]), which precisely inverts the purposes of Batson. Batson was intended to guarantee equal protection of minorities, but the policy followed in Alabama tends to place a disproportionate share of the burden of jury service on minorities. Even worse, the policies formulated in Alabama in alleged pursuit of the Batson rule, require that in criminal cases against minority defendants the proceedings be focused on race. This is not something that may happen in the future, it is happening now, as a result of the opinions in this and other Alabama appellate cases. It will continue until

this Honorable Court corrects the Alabama Courts.

In Richmond Newspapers, Inc. v. Virginia, (448 U.S. 555, 65 L.Ed 2d 973, 100 S. Ct. 2824 [1980]), this Court stated:

> "...The criminal trial which appellants sought to attend has long since ended, and there is thus some suggestion that the case is moot. This Court has frequently recognized, however, that its jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature...[citations omitted] it is not moot. Since the Virginia Supreme Court declined plenary review, it is reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record. More often than not, criminal trials will be of sufficiently short duration that a closure order will evade review, or at least considered plenary review of this court... [citation omitted.] Accordingly, we turn to the

merits..." (448 U.S. 555, 563, 65 L.Ed 2d 973, 981.)

The opinions of the Alabama appellate courts of which review is sought are now being applied in the trial courts. These rulings, when they result in a finding of a prima facie case are under Batson, always evade review and always will do so, because the state has no right to obtain review of them. It is only because of the unique appellate history of this case that this issue is now before this Honorable Court, and it is not likely that a similar opportunity will arise in the near future.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that this case is not moot, and that in this case the Court of Criminal Appeals

and Supreme Court of Alabama, decided an important question under the Fourteenth Amendment in a manner which conflicts sharply with the teachings of this Honorable Court as well as the holdings of other jurisdictions which have addressed this issue. In addition, the policy established by the Alabama Supreme Court is destructive of the purposes of the policy established by this Court.

Therefore, your Petitioner again prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and

reverse the decisions of the said Appellate Courts of Alabama.

Respectfully submitted,

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